Georgia State University Law Review

Volume 10
Issue 3 *March 1994*

Article 2

9-1-1993

New Perspectives of International Commercial Arbitration in Europe

Hans Dolinar

NEW PERSPECTIVES OF INTERNATIONAL COMMERCIAL ARBITRATION IN EUROPE

Hans Dolinar†

I. SITUATION IN EUROPEAN POLITICS

A. *Political Base*

Before I come to the topic of my remarks which will deal with *"New Perspectives of International Commercial Arbitration in Europe,"* it might be useful to describe the current scenario of European politics.

After the demise of the Communist system in the East, we in the West experienced a surge of hope and enthusiasm for a more promising future in the regions of the former Soviet hegemony. Everyone believed that peace would spread out all over the globe as a result of Glasnost and Perestroika. The devil who dominated the evil empire, to use a formula employed by a former President of this country, apparently had disappeared from the face of the Earth. Everyone expected that a new peaceful world order among individual human beings and nations would now easily be organized.

---

† Professor of Law, Johannes Kepler University, Linz, Austria. Professor Dolinar was educated in Vienna and awarded the Matura at the Bundesrealgymnasium in 1958. Subsequently, he received both the master's degree and doctorate in law from the Faculty of Law of the University of Vienna. In 1968, he was awarded the degree of Master of Business Administration by the Faculty of Economic and Social Sciences of the University of Vienna. He also earned a degree in linguistics in French from the Institute of Interpreters of the University of Vienna in 1962. Since 1982, Professor Dolinar's primary field of research is civil procedural law. After his term as president of Johannes Kepler University, Linz, Austria (1985 to 1988), he returned to research and established a joint project related to International Commercial Arbitration with Professor E.R. Lanier of Georgia State University College of Law. In 1991, Professor Dolinar was a visiting scholar at Harvard Law School where he did research in depth on International Commercial Arbitration. In 1993, Professor Dolinar was teaching a course on International Commercial Arbitration together with Professor E.R. Lanier at the Georgia State University College of Law. This essay is a revised version of remarks delivered as the fourteenth Henry J. Miller Distinguished Lecture at Georgia State University College of Law on September 23, 1993.

Today, disenchantment has set in. We all have turned rather pessimistic and skeptical because of a resurgence of tribalism and nationalism all over the European continent. The most tragic example of national and religious conflict is, as a matter of course, the actual hot war in the Balkans among the South-Slav nations which are incapable of reaching a peaceful agreement among themselves. There is also frustration because the international community has proven incapable of solving these crises and because the international community has failed to come to grips in particular with the conflict in former Yugoslavia, which is degenerating into genocide and hatred blended with petty racism among members of the same nation.

These events have taken Western Europeans and Americans by surprise. Few people really understand this new outbreak of tribalism and nationalism, not only in the Eastern part of Europe, but also in a subdued form and rather surreptitiously in Western Europe itself.

We are faced with killings, massacres, and atrocities taking place not far from the great urban centers of the continent. When the images of those cruelties appeared on television screens for the first time, there were shocked reactions everywhere in Western Europe. Now, however, a kind of fatalism and indifference for issues which do not really touch our intimate private lives has set in.

There is also widespread criticism about political incompetence and incapacity to address those issues effectively. This failure to develop workable solutions to the problems of Eastern Europe can easily be explained through a lack of understanding of the historical patterns of development and through a quite nationalistic conception of history, which had been already condemned at the beginning of this century by Arnold Toynbee in his study of civilizations.[1]

---

1. *See* ARNOLD TOYNBEE, A STUDY OF HISTORY 52 (1972). Toynbee states:
In setting out to make a comprehensive survey of human affairs, I have started by questioning the recent Western practice of making all human history culminate in the Western inquirer's own country in his own time. Since I happen to be an Englishman, I have asked myself whether it is credible that the England of my time is the culmination of history, and I have concluded that this view would be a nationalistic hallucination (This hallucination is considerably less credible for an Englishman in 1972 than it was in 1927, the year in which I started to make my notes of this book). I have recognized that England, taken by itself, is not, in fact, an "intelligible field of study," either in my time or at any earlier

The most significant trap in European politics seems to me an unfortunate tendency to resurrect old emotions and historical traditions with the result of blocking or at least impeding the European decision-making process.

Jean Monet, Robert Schuman, Konrad Adenauer, and other European minds in France and Germany succeeded in burying the classical antagonism between Germany and France.[2] There are still many protestations of friendship between the leading politicians of these nations. However, underneath the surface, the old patterns of thought are strong, especially among intellectuals who study history and who cultivate reminiscences of a more glorious national past. Therefore, we see the danger of a new nationalistic, historical consciousness building up among Europeans leading to strong preferences for national lines of thought.

The risk comes from rather old and established politicians like Helmuth Kohl, Francois Mitterand, David Hurd, and Douglas Owen who have studied their history at the Ecole Normale, at Oxford and Cambridge, and in the German Gymnasium.[3] Their hidden preferences are camouflaged by a superficial Euro-rhetoric to some extent, but then, in the course of the decision making process, suddenly you see obsolete patterns of

---

> date since the time when such a thing as England became discernible on the political map. I have therefore looked for a minimum unit, of which England is a part, which might be found intelligible if treated as being self-contained, and I have found this in Western Civilization.

Id.

2. Jean Monet was a Christian Democratic French statesman widely considered as the mastermind behind the effort to achieve European political unity in Western Europe through the European Community. Together with the French Premier Robert Schuman (from the Mouvement Republicain Populaire (MRP)), he favorably influenced public opinion in France to bring the country to sign the treaty for Communaute Europeenne du Charbon et de l'Acier (ECA) and the European cooperation related to the production and the distribution of nuclear energy (EURATOM). Konrad Adenauer was Federal Chancellor of the Federal Republic of Germany belonging to the Christian Democratic Party. With Charles de Gaulle of France, he was successful in achieving reconciliation between Germany and France after World War II and so opening the avenue for a better understanding of Western European nations among themselves.

3. Helmuth Kohl is the acting Federal Chancellor of Germany; Francois Mitterand is the actual President of the French Republic, while Douglas Hurd is the British Foreign Secretary actually in office. David Owen, a former British Foreign Secretary, is the official delegate of the European Community (now to be referred to as the European Union) in charge of trying to make a contribution on behalf of the European Union to settle the actual dispute in the Balkans.

nationalistic constructs of history breaking through and flying in the face of the need to develop such things as a European policy towards Serbia and Croatia in the Balkans.

The Europeans in the European Community (EC) have completely failed to come to grips with the problem of a common European policy in general. A clear illustration is the current crisis in the Balkans. Since the crisis developed on European territory, it appears that the EC should have had to assume prime responsibility for handling and containing it. However, so far Europeans have not shown any relevant capacity or willingness to put an end to the indiscriminate killing through a genuine and fair settlement.

Let me now turn to the Eastern part of Europe. Over the last seven decades, Communists always stressed in their ideology that nationalism will become unimportant and obsolete once the Communist regime gets firmly established through World Revolution. The promise was to create a New Soviet Man inspired by brotherhood toward mankind, a new man who was to shed off all his prejudices. Classes would disappear in society. No national antagonism would remain. A paradise for the workers of the entire world would be established. This was the dream and the vision of the Communists. If we contrast this picture with the grim reality of the late twentieth century, we see a chasm which could hardly be deeper. More than seventy years of communism passed as if nothing had happened, as if people had learned almost nothing from history. We see now, on the territory of the former Soviet Union, a great number of nations deeply engaged in petty national rivalries, incapable of living in peace, although they all have been exposed to the communist ideology for more than seven decades. In this respect, the communist system was completely ineffective. The old Adam with his egotism and his prejudices, the Hobbesian man engaged in his "bellum omnium contra omnes"[4] seems, to my regret, to be a more realistic model than the communist ideal of the New Soviet Man with his positive characteristics and high ethical standards.

It seems to me that the communist veneer had been painted only on the surface of the state edifice; underneath this surface,

4. The formula "bellum omnium contra omnes" refers to the famous work of Thomas Hobbes, *Leviathan*, in which he describes the "state of nature" as a kind of war in which individuals fight each other. *See* THOMAS HOBBES, LEVIATHAN, chs. 14, 21 (1651).

the old emotions of Panslavism and nationalism are re-emerging again.

The political situation is particularly uncertain in Russia; nobody really knows what is going on. Yeltsin has to confront the old Bolsheviks who fight back and who try to cling to those bits of power which had been left to them. They apparently believe that they can remain in place as long as they do not accept the changes in the Russian Constitution which would give the President of Russia real power to boost reforms. This seems to be the main issue in Russia today.

Furthermore, an unholy alliance appears to be emerging between the old Bolshevik cadres and the new nationalist radicals who refuse to accept the dismantling of Russia as a super power. With this constellation in the power game, it will be difficult to find serious businessmen to make investments on Russian territory, despite the fact that it should be the policy of the West in the present situation to support President Yeltsin in order to prevent chaos and a return to the old ways. Lack of help for Yeltsin might ultimately prove to be more costly than supporting him now.

B. Legal Base

With all these problems and conflicts in the Eastern European scenario, business relations with former Soviet bloc countries seem to be most unpredictable and burdened with heavy risk. The legal scholar has to think about a contribution he or she could make to mitigate that risk. In attempting to do this, the legal scholar should have a long-term perspective consisting of changing the whole legal base of operation in the Eastern European countries, but should also have a short-term perspective which, in my view, should focus on dispute resolution mechanisms such as international commercial arbitration.

Let me first venture some thoughts regarding the new legal base which should be set up in Eastern countries. The main elements should, in my view, encompass the following branches of the law:

1. Contracts and torts, including product liability
2. Commercial law and negotiable instruments
3. Corporation law and company law
4. Patents and licenses
5. Banking and international finance law

In the past we witnessed the adoption of foreign legal systems en bloc in many regions of the world. To illustrate, we could point to Japan which successfully introduced at the beginning of the twentieth century, the German Civil Code in a major effort to adjust the traditional Japanese society to the needs of a modern industrial state.[5] Such transplants are a quite familiar phenomena in the history of legal institutions. Just as the Japanese and the Koreans introduced the German Civil Code, Latin American countries adopted and modified the French Code Civil so that we have a Code Civil tradition in Central America and South America. Similarly, there is a Code Civil tradition in Quebec and Louisiana.[6]

The Swiss Code was introduced in Turkey after the movement of secularization initiated by Kemal Pasha.[7] For the commercial code, the Turks practiced a policy of eclecticism and introduced a blend of the German and Swiss commercial codes.[8]

In the southeastern part of Europe, the Austrian Civil Code was in force until the takeover by the communists in 1945.[9] This is an interesting and striking fact which is little known outside Europe. Many believe that in Bohemia, Moravia, Slovenia, and Croatia the German Code or the French Code had exerted the greatest influence. This assessment is plainly wrong; under the

---

5. The German Civil Code (Bürgerliches Gesetzbuch, BGB) was enacted in Germany on August 1, 1896 with a period of preparation of four years so that it was put into effect in Germany on January 1, 1900. *See* R.B. SCHLESINGER ET AL., COMPARATIVE LAW 268 (5th ed. 1988). The Reichsgesetzblatt (RBG1) was the Official Gazette of the German Empire, while the Bundesgesetzblatt (BGB1) is the Official Gazette of federal statute law in the Federal Republic of Germany. Japan adopted the main structure of the German Civil Code more than eighty years ago. *See id.* at 322 nn.49-50.

6. See SCHLESINGER ET AL., *supra* note 5, at 324, and especially at 12-15 where the authors give a concise and useful description of the French and Spanish legal traditions in Louisiana.

7. Turkey took over the Swiss Civil Code (Schweizerisches Zivilgesetzbuch) and the Code of Obligations as well a revised version of the commercial code. *See id.* at 323 n.56.

8. *See id.*

9. The Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch) had been enacted in the Austrian half of the Hapsburg monarchy on June 1, 1811, in effect since January 1, 1812. *See* 1 KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 156-66 (1977). Since that date the Austrian Civil Code has been amended several times, the most important amendments having taken place in 1914, 1915 and 1916, and later on, after 1945, in the 1970s and the 1980s of this century. *Id.* The Austrian Code is also available in English: GENERAL CIVIL CODE OF AUSTRIA (Oceana Publications 1972).

rule of the Hapsburgs these territories were part of the Austrian half of the dual monarchy—the countries represented in the "Imperial Diet" as we are in the habit of calling them—and they all lived under the Austrian Civil Code which dates back to 1811.[10]

The Austrian Code also prevailed in Hungary between 1848 and 1861. In the latter year, Hungarian national law was introduced which was a kind of magyarized version of the Austrian Code adapted to the special needs of the Hungarian agrarian society of the late nineteenth century. After the collapse of the dual monarchy in 1918, the successor states continued to apply a national version of the Austrian Code. This practice lasted, with the exception of Nazi occupation, until the Communist takeover in all these countries after the end of World War II.

It is to be expected that these nations will renew the old traditions and perhaps avoid reinventing the wheel again. These nations could use the case law which has developed around the Austrian Civil Code in the last five decades and adjust it to their needs so as to encompass the latest developments in doctrinal thinking. With the commercial code they could do the same. On the other hand, they could also try a transplant of the German Civil Code. However, I think they will avoid such a German incorporation for political and practical reasons. Not being particularly familiar with the oversophisticated and unnecessarily complicated German codification, they finally might prefer the Austrian alternative.

One does not know for sure. One thing seems certain to me: None of the Eastern states will leave the tradition of the civil-law system. The older generation has been educated and brought up with it, and as far as the younger generation is concerned, it is my guess that the strong affinity between the communist system and the civil-law tradition will exert a significant influence in the future. Whatever the results of this intellectual power game, the Eastern European countries should develop a long-term focus

10. SCHLESINGER ET AL., *supra* note 5, at 328 n.90. All of the countries of Southeastern Europe except Hungary had adopted typical civilian code systems, modeled on the Austrian or some other classical continental patterns. *Id.* Furthermore, the Austrian General Civil Code was a work of great originality. *Id.* at 546 n.2. It exercised considerable influence throughout Eastern and Southeastern Europe. *Id.*

consisting of introducing into their state-oriented world things like contracts, corporations, and commercial law. They also should address property issues and land registry matters to create a sound basis for land purchases by foreign investors planning joint ventures in their countries.

The German Code itself is the product of such adjustment and transplant. In point of fact, it can be regarded as the result of German erudition and conceptual jurisprudence. In German legal history, it is a well-known fact that the professors of Roman law successfully postponed its enactment for almost seventy years during the course of the nineteenth century. In the meantime, they concentrated their research on classical Roman law which they considered as the unsurpassable peak of legal wisdom. For this very reason, they used Roman law doctrines as a base for drafting the German Code. The first drafts were so steeped in Roman law that a rival school of thought, the so called Germanists, protested and finally succeeded in integrating a few German elements in the German Code.[11]

As I have already indicated, the Japanese modernized their legal base through reception of the German Code; therefore, one could argue that the major Roman law ingredient contained in the German Code was also incorporated into the Japanese legal order. A similar pattern of development occurred in connection with the spread of the French Code Civil in South America, Louisiana, and Quebec, as well as in Italy and Spain.[12]

What has this phenomenon to do with the reform movement in the Eastern European countries? I think that in the long-term we shall witness what may be called an intellectual power game which in the end will determine the system of law prevailing in the former satellite states of the Soviet Union and in Russia itself. Will it be the German Code? Will it be the French Code? Will there be common-law elements as well? Will it be an eclectic blend of all these legal systems in a modified form varying from state to state? What kind of commercial law will be introduced? These are critical questions and I am convinced that they will be solved by taking substantial portions of law from some of the

11. The German Civil Code was enacted in Germany on August 18, 1896 with a period for preparation of four years so that it was put into effect in Germany on January 1, 1900. SCHLESINGER ET AL., *supra* note 5, at 267-68.

12. See the excellent description of the influence enjoyed by the French Civil Code in Europe and Latin America. *See* SCHLESINGER ET AL., *supra* note 5, at 324-25.

major well-lubricated Western systems and transplanting them as a whole in the Eastern part of Europe. This is a fascinating phenomenon for legal minds, and I think it will also be a most fertile ground for legal scholars interested in shaping politics and society in the long run.

At first glance, it might appear of no particular interest which system of law the European East will adopt in the future. But on closer observation, the lines of the power game seem to be clearly defined: future influence of Western powers in the East will significantly depend on the affinity of legal systems which will develop in the course of the restructuring process. So helping the East not only has altruistic aspects, but also is clearly connected to the spread of influence in the next three or five decades in this part of the globe.

The transplant issue will only be relevant in the medium range future. However, the Eastern European states must also cope with the present in developing a short-term perspective. The current situation can be characterized as a mess. There is no security of contract relations and investments which is a prerequisite for well-functioning foreign trade and sound and healthy business relations with the West. Reform efforts should, therefore, concentrate on creating more predictability and security. Otherwise, no Western business firms would risk going to these countries to operate plants and distributing systems for their products.

The starting point for sound investment policies could be government-supported investment in infrastructure. Another first target might be the exploration of natural resources, permitting foreign exchange earnings which could be used to improve the other economic sectors. In whatever directions the specific lines of investment will develop, the participants must have from the very beginning the assurance that they will get fair treatment if a conflict arises out of the contractual relationships with Eastern partners.

II. ARBITRATION IN EASTERN EUROPE

In the Eastern European countries, the judicial system does not operate efficiently because of the enormous case load which has accumulated from the communist past and the lack of expertise of ordinary courts in international commercial matters. For this reason, the only alternative in the near future seems to

be arbitration as the best method of dispute resolution available at the present time.

Under the prevailing circumstances, arbitration may offer itself as a viable alternative because it could easily remove the argument of fundamental bias in favor or against one party. The language problem could also be mitigated if the parties were able to choose a language with which both parties are comfortable. It should also be emphasized in this context that it is easier to enforce an arbitral award in a foreign jurisdiction than a foreign judgment. This phenomenon is generally ascribed to the impact of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which dates back to 1958 and other international instruments which address the issue on a regional or bilateral basis.[13]

To develop an understanding of the workings of arbitration in Eastern Europe, it will be helpful to consider first, the problems connected with East-West trade and, second, the issues involved in the former intra-bloc trade among the countries which had been members of the former Council of Mutual Economic Assistance (CMEA), better known as the Warsaw Pact countries.

A. East-West Trade

In East-West trade, the jurisdiction of the arbitration courts established in Eastern European capitals was not mandatory; they could only adjudicate international trade disputes if the parties had agreed to their jurisdiction. It was not possible to file a lawsuit in international trade matters with the regular courts in the country of the defendant. However, this limitation created no real problem because Western firms were not interested in getting entangled in the domestic judicial court system of the Eastern European countries. These state courts lacked and still lack the expertise to address issues of international trade and would, in any event, have been incapable of handling such business.

Until the 1960s, the Soviet Foreign Trade Organizations (FTOs) wielded considerable bargaining power. They successfully insisted, in many transactions with the West, on arbitration in

13. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards was passed in New York on June 10, 1958. 21 U.S.T. 2517 (1958), T.I.A.S. No. 6997, 330 U.N.T.S. 38.

Moscow before the Russian Arbitration Court or the Maritime Commission which deals with admiralty cases. At this point in time, the Soviets wanted to have trade relations with the West to take advantage of new economic and technological developments. It had also never been questioned that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Magna Carta of international arbitration on a global basis applied to awards rendered by arbitral institutions in the East, although they have been organized on principles alien to Western standards and traditions.

In the 1960s, the old fear of bias against Western arbitral institutions receded to some extent which led to a stronger acceptance in the East of Western arbitral institutions such as the arbitral courts of the Stockholm Chamber of Commerce or the Zurich Chamber of Commerce. It is, however, a fact that the reluctance to accept International Chamber of Commerce (ICC) arbitration has always been a typical feature of Eastern attitudes in international arbitration.

Since the Communist demise in 1989, the old bargaining power of the FTOs no longer exists. Western business corporations would today simply refuse to have any future disputes arising out of their relations with Eastern partners exclusively adjudicated in the home forum of the defendant. So it remains to be seen how arbitration will develop in East-West trade in the future. The contours of such a development will essentially depend on the characteristics of the arbitral systems which will be established in the East in the course of the current reform movements.

It also remains to be seen whether it is rational for Western partners to insist on Western institutional arbitration before the ICC or any other neutral forum, such as Stockholm or Zurich, which have been developing a reputation for objectivity and neutrality in the past.

If a Western partner tries to insist on the ICC rules, for example, he might either lose the business unnecessarily if the Eastern partner does not agree to the request or, in case of conflict, the defendant might become most recalcitrant trying to escape ICC arbitration for reasons of cost.[14]

---

14. See W.L. CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION app. II (1990), in particular fee schedule, apps. II-16 and 17.

The record of the arbitration courts in the East was not bad on the average, but there had been exceptions like the Soviet-Israeli oil case. Even so, Westerners could usually expect reasonably fair treatment by arbitral courts in the East. In point of fact, however, the arbitral institutions in the former Soviet bloc were not really arbitration courts, and the decisions rendered there were also not genuinely arbitral in character for a number of reasons: First, the panel of arbitrators was closed. The parties could *only choose national arbitrators* who had been put on the list of the courts by the communist governments. Second, arbitration was *mandatory at least in intra-bloc trade.* For the Westerner who wanted to do business, the pattern and style of arbitration was essentially the same, with the important exception that in East-West trade, jurisdiction was derived from the *arbitral agreement* itself. Third, the *arbitral court was not independent*, rather it was instead tightly attached to the state-run chambers of commerce which had nothing to do with Western-style associations of businessmen for the protection of their interests within the framework of a state legal order. Fourth, the *only language* in which the arbitration could be conducted was the *national language of the place of arbitration.*

B. Former Intra-Bloc Trade—Moscow Convention

Let me now turn to the intra-bloc trade in Eastern Europe. In the past, the former CMEA countries developed a special system for handling trade disputes arising out of cross-border relationships between the typically monopolistic FTOs. In 1972, these countries signed the Moscow Convention for the purpose of adjudicating disputes arising in intra-bloc trade on a mandatory basis.[15] The whole former CMEA trading area was covered by a network of arbitration courts attached to the chambers of commerce of the several states. If a dispute arose between two signatories of the Moscow Convention, the claimant had to bring his action in the court where the defendant had its residence, domicile, or place of business. However, the parties also had the

15. CMEA Convention on Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Co-operation, May 26, 1972, Bulg.-Czech.-G.D.R.-Hung.-Mong.-Pol.-U.S.S.R., 1 W.L. CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION Doc. III.1 (1990).

option to agree on the jurisdiction of the arbitration court of a third CMEA country.

The Moscow Convention was essentially applied to disputes arising out of sales contracts, service contracts, and arrangements related to the cooperation among the FTOs. The core element in the Convention was the procedural rule mentioned above which states that disputes in intra-bloc trade should be subject to arbitration in the country of the respondent. With this rule, the former CMEA countries had to submit to jurisdiction of that forum on a mandatory basis. Because of this coercive element, some Westerners argued that this kind of dispute resolution could not qualify as true arbitration. They claimed that arbitration conducted under the Moscow Convention was not really arbitration but special state-based adjudication of commercial disputes which had to fit into the framework of economic state planning.

The CMEA member states also developed a set of rules called the General Conditions for the Delivery of Goods (GCDG)[16] which represented the basic substantive law under which the intra-bloc trade was organized. Together with uniform rules of arbitration governing the whole Eastern network of arbitration courts, the Moscow Convention and the GCDG were the characteristic elements of the Eastern European arbitral environment until 1989.

It appears useful to draw up a short list of the key characteristics of Eastern European arbitration which at the same time can be regarded as the main flaws of the old system.

1. The *parties were forced to arbitrate in the country of the defendant.*

2. Although each CMEA country set up an arbitration court under the auspices of its chamber of commerce, these agencies were *not independently organized bodies* for the defense of the interests of businessmen and merchants as in the Western tradition, but governmental organizations designed to participate in the implementation of economic state planning.

16. Heinz Strohbach, *General Introduction on Arbitration in CMEA Countries, in* 1 INTERNATIONAL HANDBOOK OF COMMERCIAL ARBITRATION 1-11 (Albert Jan Van Den Berg & Pieter Sanders, eds., 1993).

3. The *arbitration courts operated with a mandatory list of arbitrators* which was binding on both the parties and the appointing authority.

4. *Arbitrators had to be nationals of the country where the arbitral court was established*; therefore, on the arbitration court in Moscow, the arbitrators would only be Russians and only Czechs and Slovaks on the arbitration court in Prague.

5. The *parties could not choose the law applicable to the substance of the dispute.* They had to rely exclusively on the above mentioned GCDG.

6. Finally, the *hearings* of the courts could *only be conducted in the language of the country of the place of arbitration.*

As positive elements of the old system, I can only identify two. First, the courts of arbitration had a *concentration of expertise in commercial cases.* As members of international arbitration panels, the arbitrators of the Eastern arbitral courts had been developing considerable expertise in handling foreign trade cases. In point of fact, they had been the only group of persons in the East to show such competence. Second, there was a *network system* under which arbitration courts have been set up in all capitals of the former CMEA states. This arrangement provided the only efficient base for dispute settlement of a commercial character in the Eastern European countries. In my view, this network system could be developed into a most powerful tool if it were combined with a radical reorganization of the old arbitral courts now operating in Eastern Europe.

Some arbitral courts, for example, the Hungarian Court of Arbitration in Budapest, terminated the unfortunate practice of the closed list accepting free party choice of arbitrators as a matter of course.[17] Others gave the parties the right to choose freely the language of arbitration.

In many cases, the arbitral courts have, in general, become more independent from the government. Almost all former CMEA countries have been setting up a Western style chamber of commerce. I, along with Professor E.R. Lanier from the Georgia State University College of Law, had the opportunity to visit

17. See RULES OF PROCEDURE FOR THE COURT OF ARBITRATION ATTACHED TO THE HUNGARIAN CHAMBER OF COMMERCE (1989). The Hungarian Court of Arbitration keeps a list of arbitrators only to give the parties useful guidance when they have to choose arbitrators. *Id.* art. 4(2).

some of them in Prague, Budapest, Warsaw, and Sofia to get first-hand information on their current functioning, and our general impression was quite positive.

C. Problems and Perspectives

Despite these valuable reform efforts, a multitude of problems connected with arbitration in the East have been emerging in the course of the reform process itself. In the past, the players had been clearly defined. On the Eastern side, the partner was the FTO with its typical monopoly position in foreign trade. The Western partner who had entered into a relationship with such an organization could be sure that the arbitral award, once rendered, would be honored. Now the scenario has completely changed. Instead of the monopoly agencies, Western businessmen have now to deal with a large number of private entities and state bodies who are doing business on their own in foreign trade. These private entities and state bodies can go bankrupt, and their financial standing is difficult to assess; it will, therefore, be necessary to conduct solid investigation before entering business relationships. One cannot expect arbitral awards to be honored as a matter of course. Since the economic situation is not very promising, the risk of default and loss is quite high.

At the international level, the actors have also changed. We see the emergence of new state entities, for example, the Czech and Slovak Republics, Slovenia, Croatia, Serbia, the Baltic states, Russia, and the members of the Commonwealth of Independent States (CIS), such as the Ukraine and Belarus.

These changes prompted the majority of Eastern European countries to challenge the validity of the Moscow Convention. Let me illustrate this by a typical reaction of a reform state such as Hungary. Dr. Eva Horvath, the president of the Hungarian Court of Arbitration, argues that the Moscow Convention should no longer be applied to disputes among private citizens of two different former CMEA countries because private individuals are not "organizations of trade" within the meaning of the Moscow Convention.[18] If you construe the text of the Moscow Convention

18. *See* Eva Horvath, Perspectives of International Arbitration in Eastern Europe 3 (1993) (unpublished paper presented on June 28, 1993 at the seminar organized by the Univ. of Linz, Faculty of Law, Dep't of Civ. Proc. on Selected Topics of Int'l Com.

even narrowly, you could argue that it applied only to the former FTOs. Since they no longer exist, the whole Convention has become legally inapplicable.

Furthermore, it is not clear whether the Moscow Convention should also be binding on the new states which have emerged after the demise of the Soviet Union such as the Baltic states, Ukraine and Belarus.

A minority of the former CMEA states still feel that it would be better to have some base for trade with Eastern partners than none at all. In their view, the alternative of giving up the Moscow Convention altogether would mean a return to jurisdiction and dispute resolution through the regular judiciary which is regarded as a disaster because of its total lack of expertise in foreign trade.

For this reason, it is understandable that there is some hesitation to throw the Moscow Convention away without knowing what will replace it. This seems to be the position of Russia and the Moscow Court of Arbitration. This court and the Maritime Arbitration Commission are still in operation and continue their activities apparently without any change of the rules of procedure, statutes, and list of arbitrators. However, the Soviet Chamber of Commerce to which the arbitration court has been attached no longer exists. The assets of this entity and its powers are now vested in the new Chamber of Commerce of the Russian Federation. According to recent reports, about 500 cases are pending in that court. It appears that the Russian Arbitration Court handles all disputes arising from contracts containing an arbitration clause in its favor.

Fortunately, one after another of the satellites of the former Soviet Empire want to terminate the Moscow Convention and replace it with Western-style arbitration based on party autonomy. Dr. Eva Horvath, the president of the Hungarian Court of Arbitration, reported, for example, in a paper presented in Milan, Italy on June 11, 1993, that the decision on the termination of the Moscow Convention is already on the agenda of the Hungarian Parliament.[19]

Arb.).

19. *See* Eva Horvath, Practical Ways in which the Arbitral Institutions are Tackling the Main Issues (Hungary) 4 (1993) (unpublished paper presented on June 11, 1993 in Milan, Italy at a seminar on Int'l Com. Dispute Settlement).

In other former CMEA states, rules of arbitration may still contain remnants of the old system. Faced with this new situation, Westerners have essentially three options:

1. They may choose not to do business at all with Easterners because of the risks involved.
2. They may insert in the contract an arbitration clause permitting arbitration before the arbitration court of the country of the defendant or another country of the East.
3. They may try to persuade the Eastern partner to sign an arbitration clause for a Western arbitration institution. The third option essentially depends on the relative bargaining power of the partners and their financial capacity to meet the high cost involved.

In view of these problems, it will be necessary for Western businessmen who do not want to lose money to check the arbitral rules and the practice of the arbitral courts in the East and then agree perhaps to submit to arbitration there. An award rendered under the auspices of the home institution may not be such a bad bargain after all. If it is favorable, the Western partner will have a clear advantage at the enforcement stage because it is technically easier to enforce an award rendered by—let's say—the Hungarian Arbitration Court against a Hungarian than one which is rendered by a foreign institution.

The business community should consider the whole range of arbitral institutions and state courts at its disposal. A claimant may have the option to bring his complaint in the state courts of his home country or in the state courts of the country of the respondent. He may use international institutional arbitration such as the American Arbitration Association (AAA), the ICC, or the Vienna or the Zurich center and so forth. He also may rely on ad hoc arbitration, or he can try out the arbitration courts in Eastern Europe.

In a fair number of cases, the last approach may be the best solution in view of an efficient enforcement of the eventual arbitral award. If the rules of the defendant's court present a sound guarantee of party autonomy and freedom in the arbitral process as to the choice of arbitrators, the choice of law applicable to the arbitral agreement, the arbitral proceedings, as well as preserving the substantive law applicable to the merits of the case, the Western partner need not be afraid of a biased panel deciding deliberately against him. Choice of language should also be covered by that freedom without undue increase in

cost if the arbitration is not conducted in the national language of the country where the arbitral court is established.

Westerners will also develop more confidence in the arbitral process if the arbitral institutions themselves refrained from unduly interfering with the arbitral proceedings. It must be admitted that the risk of interference will increase if the parties are not willing to conduct the arbitration in fairness and in a cooperative spirit. However, this is not a peculiarity of Eastern arbitration. If the respondent engages in obstruction and delaying tactics, every arbitration will be in jeopardy.

Before turning to a more general perspective, I think it is appropriate to deal with one last special problem related to joint ventures and the Moscow Convention. If, as a joint venturer, you entered into a business relationship with some partners from other CMEA countries, you will have to face the fact that these relations might be governed by the Moscow Convention with its mandatory arbitration in the country of the respondent. Dr. Eva Horvath, of the Hungarian Court of Arbitration, stated in a paper presented in Vienna, Austria that the Moscow Convention may concern foreigners coming from a country not a party to the Convention.[20] If a foreign private individual or company is participating in a venture, the joint arrangement is deemed to be an "economic organization" for the purposes of the Moscow Convention. Its rules will therefore be applied if the joint venture enters into a commercial relationship with an "economic organization" seated in another former CMEA country. In case of a legal dispute, the action will have to be brought in the court of arbitration of the defendant and the application of the old General Conditions for the Delivery of Goods might also be regarded as mandatory.

The issue is not as theoretical as it may seem at first sight. If, for example, an American corporation puts up a plant in Hungary for the manufacture of cars, then the Moscow Convention would apply if those cars are sold to a Polish or a Czech company.

Everything is in a state of flux in the Eastern European countries. For this reason, the best approach is to identify the

20. *See* Eva Horvath, The Situation in Hungary 9 (1992) (unpublished paper presented at a seminar held on May 21-22, 1992 in Vienna dealing with Resolving Business Disputes between U.S. and Central European Enterprises and New Developments in some former CMEA-Countries).

possible issues and then check them with updated information and gauge the chances and risks of the enterprise.

To illustrate this approach, I will use the Hungarian Court of Arbitration as a model and check whether it meets the six criteria of modern international commercial arbitration on Western lines. Initially, the arbitration should be based on the *agreement of the parties,* and all coercive elements concerning the forum of arbitration should be eliminated. In Hungary there will not be a problem with this criterion because, as a matter of fact, it is possible to enter into arbitral agreements. Since the Moscow Convention will be terminated in the immediate future, the risk of a spillover of the old rules through joint ventures will fortunately also be removed.

The second criterion requires that there should be an *open list of arbitrators.* The parties should have the option either to rely on the list of the court or to make their own choice and select other persons of their own preference. It should also be clear that all national lists are obsolete and suspicious. Therefore, care should be taken to include foreign experts to provide real guidance for the parties as to the identities and qualifications of the arbitrators.

The practice of the closed panel has been abandoned in Hungary. The Hungarian Court also has on its list foreigners who are experts in arbitration and in the area to which the case is connected. The list serves only as a guidance to parties who do not know whom to appoint as arbitrators. The parties' choice is not confined to the list. They can also select arbitrators of their own preference. Therefore, it would be perfectly possible for an American firm that has a dispute with a Hungarian firm and had stipulated for arbitration in Budapest before the arbitral court there to appoint an American or a neutral arbitrator. The Hungarian could do the same, and the party-appointed arbitrators could then appoint Dolinar as a neutral chairman. I have no reason to find anything wrong with such a pleasant scenario.

The third criterion provides that the parties should be *free to determine the place of the arbitration* selecting, for example, Vienna, Paris, or New York even if the supporting authority were the arbitral court in Budapest. Article 6(1) of the Hungarian Rules stipulates that the seat of the arbitration court shall be in

Budapest.[21] Paragraph 2 of the same Article then specifies that the place of the hearings shall also be Budapest. However, the arbitration tribunal may, if necessary, conduct hearings at another place.[22] Reading these provisions, I have to conclude that with respect to location of the arbitration the Hungarians have not yet fully emancipated themselves from the past, although they permit the arbitral panel to move to a place other than Budapest. It would have been more liberal and attractive if they had given the parties the right to determine for themselves the place of the arbitration without any limitation.

As a fourth criterion, the parties should also have *discretionary power to choose the law applicable to the substance of the dispute.* On this point there is a clear provision in the Hungarian Rules: Article 13(1) states that the arbitral tribunal and the sole arbitrator shall apply the law stipulated by the parties. The selection of a given legal system is to be understood as a direct choice of substantive law excluding the respective conflict of law system.[23] With this rule, the Hungarians are in line with the principles of the Western arbitral institutions which all stress party autonomy as to the choice of the law applicable to the merits of the case.

To revisit our example we have so far, an arbitration with an American and a Hungarian as arbitrators and an Austrian as presiding chairman. In addition to this, the parties could perhaps choose the law of the State of New York as the law applicable to the substance of the dispute. Other options could be Austrian law or Swiss law as neutral legal systems with Western style legislation in commercial and business matters. There is clearly no pressure whatsoever to apply Hungarian law to the merits of the case.

---

21. RULES OF PROCEDURE FOR THE COURT OF ARBITRATION ATTACHED TO THE HUNGARIAN CHAMBER OF COMMERCE art. 6(1) (1989) reads: "The seat of the Arbitration Court is Budapest."

22. RULES OF PROCEDURE FOR THE COURT OF ARBITRATION ATTACHED TO THE HUNGARIAN CHAMBER OF COMMERCE art. 6(2) states: "The place of the hearings is in Budapest at the headquarters of the Hungarian Chamber of Commerce. The tribunal acting in any case may, when necessary, hold hearings at another place."

23. RULES OF PROCEDURE FOR THE COURT OF ARBITRATION ATTACHED TO THE HUNGARIAN CHAMBER OF COMMERCE art. 13(1) reads: "The Arbitral Court shall apply the law stipulated by the parties. The stipulation of a given legal system is to be understood to be the stipulation that refers directly to the substantive law and not the conflict of law norms of the given state."

The fifth criterion provides that parties should be able to freely *choose the language* of the arbitration. This choice should not only be confined to the written pleadings, such as the statements of claim and defense, but should also extend to the hearings and evidence. If provision can be made before an arbitral court in the East to conduct the hearings in English or some other foreign language, then language will no longer be a stumbling block for the arbitration, giving the respondent the great advantage to impose his mother tongue on the other party.

Under Article 8(1) of the Hungarian rules, the parties may freely determine the language of the proceedings if the conditions for the proceedings conducted in such language may otherwise be ensured.[24] Since the Budapest center also has excellent facilities for arbitration in English and German, this limitation essentially means that if the parties choose a language other than Hungarian, German, or English, they will have to meet the additional cost involved with such a choice.

If the parties fail to determine the language, the right to do so shifts to the arbitral tribunal which will have to consider the relevant facts and circumstances of the case, in particular the language of the arbitral agreement and their prior correspondence.

To turn to our example: We now can have an arbitration between an American and a Hungarian party with an American arbitrator, a Hungarian arbitrator, and an Austrian chairman, which will be conducted in English. For convenience, the arbitration could be conducted even in Vienna or in Paris, and the law applied to the merits may be the law of the State of New York.

The final criterion concerns the *independence of the arbitral institution itself* from government interference. The arbitral court is now attached to the autonomous Hungarian Chamber of Commerce much like its model, the Vienna International Center of Arbitration, or the Stockholm Arbitration Court in Sweden. The restructured Hungarian Chamber of Commerce is an association of businessmen and manufacturers independent from the government designed to promote and protect the economic interests of its members.

---

24. RULES OF PROCEDURE FOR THE COURT OF ARBITRATION ATTACHED TO THE HUNGARIAN CHAMBER OF COMMERCE art. 8 states: "In the agreement to submit a legal dispute to arbitration the parties may agee on the language of the hearings."

I come back to my point. It will be important to study the arbitral rules of the arbitral body in question and there will be no objection to submit and to do business with the Eastern partner if the rules are liberal and if the supporting authority thus established is capable of doing a good job and performing its function. It will be the task of the ongoing research of Professor E.R. Lanier and myself to provide the public with the information necessary to make an accurate assessment of the risks involved in Eastern arbitration and to suggest appropriate solutions.

One note is in order here: Having described the Hungarian system as a model, I do not want to create the impression that any other arbitral court in the East is organized on the same lines. This is by no means the case. The picture is mixed and there are a number of states which preserve in their arbitration systems still many key elements drawn from the old system operating under the Moscow Convention.

The Hungarian Court of Arbitration shows the right course on which the Eastern countries should embark in international commercial arbitration. They must first create a completely voluntary arbitral system from which all compulsory elements inconsistent with modern arbitration are eliminated.

The Hungarians have set a good example. As already mentioned, they will soon terminate the Moscow Convention and have established new arbitration rules which permit modern style arbitration on Western lines. It is to be hoped and expected that other former CMEA countries will follow suit in order to put the former intra-bloc trade on the same legal base as any other international commercial transaction and to promote exchange with the West by inspiring confidence in their institutions. This would, in my opinion, greatly facilitate trade and reform in the East. Legal scholars can make a significant contribution in the reform process and, therefore, it appears to be desirable that other universities adopt a similar active stance as the Georgia State University College of Law is doing in this respect.

CONCLUSION

Let me now come to the conclusion of my presentation. As I have already indicated, I see two positive elements in the system of arbitration as it developed in the East. The first is the network concept. The idea to cover the whole territory of trade with a network of connecting arbitral courts is a most pragmatic

approach for promoting dispute resolution across national borders. However, care should be taken to preserve the autonomous character of arbitration and leave it to the parties to submit to the jurisdiction of the arbitral courts belonging to that network.

The second positive element which is linked to the first lies in the concentration of expert knowledge within the arbitral system. Each court of the network can establish a body of professional knowledge in commercial matters with an international touch. Such knowledge seems to me a most valuable asset and will perhaps contribute to an efficient arbitral system all over the area which will function on Western lines once the reform movement has eliminated from that system the last remnants of the old straitjacket structure in the tradition of the Moscow Convention.

The network idea could even prove a most powerful tool to develop arbitration in Western Europe as well. So far, there does not exist in the territory of the EC a network of arbitral courts comparable to the Eastern system. On the other hand, there is a strong need to have available a cross-border system of dispute resolution which functions without any suspicion of national bias. Business firms have to turn to the national court system most of the time or they use the established international institutions such as the Arbitration Court of the International Chamber of Commerce in Paris. I think, however, that these institutions rather cater to the needs of the big corporations which turn to them in case they have to settle large disputes running into millions of dollars.

There is no viable arbitral system in place that serves the needs of the medium-sized business companies. If the EC were covered with a network of arbitral courts similar to that of Eastern Europe, a first step towards a federal judiciary within its legal framework would be accomplished.